West Motor Freight of Pennsylvania *and* International Brotherhood of Teamsters, Local 391, AFL–CIO. Case 11–CA–18365

July 21, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On April 27, 2000, Administrative Law Judge Howard I. Grossman issued the attached decision. The General Counsel filed exceptions and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, West Motor Freight of Pennsylvania, Greensboro, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Lisa Shearin, Esq., for the General Counsel.
Jonathan P. Sturgill, Esq. and *Ray Blankenship, Esq. (R. T. Blankenship & Associates),* for the Respondent.
Randy Conrad, Organizer, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN**,** Administrative Law Judge**.** The original charge was filed on June 7, 1999,[1] and amended charges on September 28, October 13, and November 5, by International Brotherhood of Teamsters, Local 391, AFL–CIO (the Union). A complaint issued on September 9, and an amended complaint on November 19, alleging that West Motor Freight of Pennsylvania (Respondent or the Company) violated Section 8(a)(1) of the Act by interrogating employees about their union and/or protected activities, by giving them the impression that their union and/or protected concerted activities were under surveillance, and by threatening them with loss of employment in order to discourage their union and/or protected concerted activities. The complaint also alleges that Respondent violated Section 8(a)(3) of the Act by discharging employee Daniel Morehead because he joined, or supported the Union and in order to discourage similar activity by other employees.

A hearing on these matters was conducted before me in Winston Salem, North Carolina, on January 19 and 20, 2000. Thereafter, the General Counsel and Respondent filed briefs. Subsequently, Respondent submitted a reply to the General Counsel's brief, and the General Counsel submitted a motion to reject the reply brief. I have not considered the latter two documents, as there is no provision in the Board's Rules for the filing of reply briefs at this stage in the proceeding. Based on all the evidence of record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Pennsylvania corporation with a facility located at Greensboro, North Carolina, where it is engaged in regional truck hauling. During the 12 months preceding issuance of the complaint, Respondent derived gross annual revenue at its Greensboro, North Carolina facility, in excess of $210,000, and performed services valued in excess of $50,000 for employers located outside the State of North Carolina. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE COMPANY'S OPERATIONS

The Company has a terminal in Greensboro, North Carolina, and makes deliveries of merchandise for its customers. Prior to about October 1998, its principal customer was K-Mart. In about October 1998 it acquired another major customer, International Paper, and the area of its deliveries became larger. The two customers provided about 90 percent of its business. Prior to the acquisition of International Paper, the business was run by Division Manager Daniel Apple and Supervisor Sharon Johnson from a small office about 15 by 20 feet in size. With the increased business, Supervisor John Beckwith was added. The assignment of drivers to particular trips was informal, most of it on the telephone. According to former driver James Reddick, drivers were dispatched one load at a time, even though a trip may have had multiple stops. Thus, after the first stop, the driver called and received instructions for his next stop. After his last stop, he called and received his order for the following day. Daniel Morehead corroborated this testimony.

The Company's witnesses testified that its principal customers were very concerned that deliveries be on time. However, Reddick testified that K-Mart was frequently not ready with a load at its distribution center at the scheduled time for departure. This would cause the driver to be late in departing from the K-Mart facility, and cause him to be late on the subsequent deliveries to the stores. Reddick asserted that the Company did not know whether a K-Mart load was ready, and did not know whether a late delivery to the store was caused by K-Mart's or the driver's lateness unless the driver called and informed the Company. Reddick speculated that the Company could derive this information from a notation placed on the shipping document by the guard at the K-Mart distribution center. However, on examination of a memorandum evidencing issuance of a bill of lading, Reddick was unable to find any such notation, nor could I.[2]

Former driver George Enoch testified that he would sometimes have to wait 2 or 3 hours at the distribution center for his load. He has waited as much as 4 hours, only to be told by K-Mart that they canceled the shipment. When he arrived late at the K-Mart stores, the receiving employees were upset, and occasionally had gone home. Enoch would then have to get the

[1] In his conclusions of law, the judge referred to the Union as the Pipeliners Local Union No. 798 rather than the International Brotherhood of Teamsters, Local 391, AFL–CIO. We correct this inadvertent error.

[1] All dates are in 1999 unless otherwise stated.

[2] GC Exh. 2.

store manager to help unload the freight. Enoch stated that he knew the travel time to each stop. Accordingly, when K-Mart was late with a shipment, Enoch asked the distribution center personnel to call the stores and tell them when he would arrive. According to Enoch, more than half the K-Mart stores said they received no such message. Division Manager Apple acknowledged at the hearing that K-Mart loads sometimes came out late.

Enoch also testified that he made deliveries to First State Packaging in Salisbury, Maryland, from International Paper in Georgetown, South Carolina, once or twice a week. The shipments always originated in Georgetown. No delivery time was ever specified, and Enoch made the deliveries at any hour of the day or night. Receiving personnel were always available. Most of the time, the load was a "drop and hook" shipment. If the merchandise was not needed immediately, Enoch simply parked the loaded trailer, and "hooked" onto an empty one.

III. DRIVER COMPLAINTS, THE UNION CAMPAIGN, AND DANIEL MOREHEAD

The drivers met one another at K-Mart's Greensboro distribution center and at various stops. They complained about the increased driving time since Respondent's acquisition of the International Paper account, and inadequate compensation. They were generally compensated by payment of a percentage of the Company's fee for each shipment. Thus, for long trips the driver was making smaller amounts for each hour of driving. They were not compensated for "dead-heading," i.e., hauling an empty trailer. Nor did they get paid for the time spent waiting at the distribution center for a load. Reddick and Morehead testified that they complained about these matters to Division Manager Apple. In early 1999, Apple distributed a memo to drivers acknowledging that the Company was "experiencing a great amount of turmoil within its driver fleet," and soliciting an expression of concerns from individual drivers.[3]

Daniel Morehead started driving for the Company in May 1998. In addition to the complaints of other drivers, listed above, Morehead had his own. He believed that he was being unfairly deprived of a "safety award" because of an accident for which he was not responsible. Although he received a citation for an unsafe lane change, this was reversed by the state court. Despite this fact, division manager Apple told Morehead, "West is finding you guilty."

Morehead testified that, on April 23, he told Supervisor Sharon Johnson that he was "pissed off" at being denied the safety award. She told him to take some time off, and he did so. Later in April, Johnson told him that K-Mart was going to be working 7 days a week. Morehead responded that he was about to become a grandfather, that he did not mind working 6 days a week, but that 1 day a week was going to be "for his grandbaby." Apple later explained to Morehead that, if he worked 7 days, he was still going to get 2 days off. Morehead replied that this was acceptable, and did not refuse any assignment. Johnson, however, contended that Morehead "cursed" her for a half hour to 45 minutes, and said that he was not going to work weekends. Morehead denied that he cursed anybody, and, as indicated, did not refuse any assignments. Respondent did not issue any warnings or reprimands for the alleged cursing, although Johnson herself had authority to discipline employees, and reported the asserted cursing to Apple. The latter's response, "in passing" according to his testimony was to ask Morehead whether "everything was O.K.," although Apple also contended that there was "more to it than that."

On April 28, Morehead called the Union, and the next day spoke to organizer Randy Conrad. Morehead explained the drivers' concerns, and it was decided to hold a meeting on May 8 at Morehead's house. Conrad advised Morehead to keep a "tight lip" on the matter. This meeting took place, with a total of 3 employees, including Morehead, together with Conrad. It was decided to schedule another meeting for May 16.

Division Manager Apple testified that Morehead was an acceptable employee until about December 1998. From that point, "everything just started heading downhill steadily and fast." In late January or early February, Apple asserted, he told Morehead that he was "falling down" and was "late all the time." He thereafter had two or three more conversations of this nature with Morehead, but could not specify the dates, except for May 10. Apple testified twice about this asserted conversation. On January 19, 2000, called by the General Counsel, he testified that on May 10 he told Morehead that he had made late deliveries, and that he made comments about Morehead's attitude. He told Morehead that he was "hurting everybody," and that he would have "to go" if he did not improve. In his pretrial affidavit, Apple refers to a conversation which he had with Morehead on May 10.[4]

Supervisor Sharon Johnson also testified on January 19, 2000. She described the 15-by-20 foot office in which she worked. It had three desks; Apple, Beckwith, and Johnson occupied these desks and communicated constantly together. Johnson testified that on May 8 she instructed Morehead to come into the office on May 10, and that he did so. She asserted that she overheard Apple discussing "late deliveries" with Morehead. Johnson also testified that on an unspecified occasion, she spoke to Morehead about being late. There is no reference to this in her pretrial affidavit prepared for the Board, nor one which she prepared for the Company.

Morehead was the last witness for the day on January 19, 2000. He testified that he made deliveries on May 10, and denied going into the office on that date. The General Counsel introduced Morehead's daily log for May 10, showing that he made four deliveries in three cities on that date.[5] Morehead denied coming into the office and speaking with Apple about anything on May 10, and denied speaking with Apple or Johnson about late deliveries until the day he was terminated, May 18.

On the next day of hearing, January 20, 2000, Respondent called Apple and showed him Morehead's daily log for May 10. Apple testified that this document showed that Morehead was not in the office on May 10, 1998, and, accordingly, that his own affidavit "incorrectly stated the date." The conversation actually took place the following day, May 11, according to Apple.

Sharon Johnson also testified for a second time on this subject on January 20. She asserted that the dates were "messed up," and that the conversation with Morehead took place on May 11. John Beckwith submitted an affidavit to the Board with an attached statement he had given to the Company. In the latter document, he asserts that Morehead came into the

[3] GC Exh. 4.

[4] GC Exh. 33.

[5] GC Exh. 22.

office on May 10.[6] At the hearing on January 20, 2000, Beckwith stated that the May 10 day was inaccurate, and that the conversation took place on May 11. He also testified that he talked with Respondent's attorneys on January 19–20, and that it was on the latter date that he discovered the error in his statement. On redirect examination by Respondent's counsel, the record reads as follows:

> Q. Today, did I not inform you of the incorrect date of the 10th as being a Monday and it having been problematic?
>
> A. Yes.
>
> Q. And we discussed that?
>
> A. Yes, we did.

Beckwith also testified that he did not know that Apple and Johnson had given May 10 as the date Morehead was called into the office. Apple and Johnson denied knowing that their colleagues had given similar testimony.[7]

Morehead denied speaking with anybody from the Company about late deliveries until May 18, the date that he was terminated.

Respondent also attempted to establish that Morehead in fact had been late. It submitted a series of documents, each entitled "Cover Bill," evidencing shipments on various dates to various locations by Morehead, with the latter's signature, at various times as early as 4 a.m.[8] On cross-examination, Morehead stated that he was late on most of these trips, either on pickup or delivery. Morehead's meaning is shown by the following portions of the transcript:

> Q. The exhibit 4/15/99, was that late delivery rather than pick up?
>
> A. That was late delivery.
>
> Q. Why were you late delivering it?
>
> A. Because it was picked up late.
>
> Q. So you picked it up late, too?
>
> A. It was late coming out.

Division Manager Apple was shown a "cover bill" with a driver's signature and time, and surmised that the time indicated by the driver's signature was the time "he signed out of the guardhouse." This leaves unanswered the question of whether the driver had to wait to get the shipment. Division Manager Apple was also shown a "cover sheet" without any driver signature, and said that it was impossible to determine pickup or delivery time.[9]

IV. RESPONDENT'S SAFETY MEETING AND THE SECOND UNION MEETING

The Company held a safety meeting at a restaurant on the evening of May 16, at which it presented safety awards to several drivers. A company representative showed an accident report, which listed Morehead with two accidents. After reading it, he threw a copy on the table, and Apple told him not to get "upset." George Enoch testified that the drivers complained of driving many miles without getting paid for them, while Morehead testified that other drivers complained of low pay, "deadhead miles, and absence of "layover pay."

Sharon Johnson agreed on cross-examination that she knew the drivers in the spring of 1999 were unhappy about working conditions, pay, long hours, and waiting time. She also agreed that, at the safety meeting, Morehead wanted to talk about pay, and said that the Company did not care about its drivers. Johnson asserted that she could not remember any other drivers complaining about working conditions. She felt that Morehead's statements were "disruptive," and were "disturbing" to other drivers.

Rodney Patterson was asked on cross-examination whether Morehead was "disruptive" at the meeting. He replied that Morehead sounded "upset." Asked whether Morehead "cussed," Patterson answered that he "might have said a profane word." George Enoch was asked similar questions on cross-examination, and denied that Morehead was "disruptive" or that he interrupted anybody.

As related above, a second union meeting had been planned for May 16. After the safety meeting, Morehead spoke to the drivers in the restaurant parking lot. He said that there was going to be a meeting at his house that night, that the union representative was going to be there, and that the complaints should be made to him. Four drivers including Morehead, Rodney Patterson, and Union Representative Conrad attended this meeting. Two others, Clarence Cheek and a driver named Demetrius, planned to attend and were following the other drivers, but "just turned off," and did not attend. At Morehead's house, all the employees present signed union authorization cards, and discussed their various complaints against the Company. They decided to try to get other drivers to sign authorization cards.

V. MOREHEAD'S LAST ASSIGNMENT AND DISCHARGE

Morehead testified that Apple gave him an assignment during the safety meeting. He was told that he was to take a load to Salisbury, Maryland, "in the morning." Morehead interpreted this order (correctly) to mean that he was to take the load on the next day, Monday. He also testified that he told the Company representatives that he would leave at 2 a.m., in order to avoid the heavy belt-line traffic around Washington into Baltimore. However, Apple testified that he told Morehead the load had to be delivered by 8 a.m. in Salisbury, and that Morehead responded that he would leave Greensboro by 2 a.m. Su-

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[6] R. Exh. 12.

[7] A sequestration order was in effect during the hearing. Neither Apple, Johnson, nor Beckwith was present when either of the other two was testifying. The General Counsel contends that it is improbable that all three of these witnesses would have independently come to the conclusion that their original testimony was inaccurate, and that May 11 was the date of the conversation with Morehead. Accordingly, the General Counsel argues, the sequestration order must have been violated by disclosure of the testimony of other witnesses, citing *National Football League*, 309 NLRB 78, 129–131 (1992). GC Br. at 24.

[8] R. Exh. 8.

[9] Apple testified that the shipping order prepared by K-Mart is a multipage document. The "cover bill" identifies the specific stops "and then there is detailed stops specific information" (sic). Accordingly, the General Counsel argues, R. Exh. 8 is not a complete document. Moreover, it was not provided in response to the General Counsel's subpoena for "a complete copy of the K-Mart Bills of lading from January 1, 1999 to June 1, 1999." Rather, Respondent presented the document in support of its contention that Morehead was "late" on pickups and deliveries. Because of its failure to comply with the subpoena, the General Counsel argues, it may not do so, citing *Bannon Mills*, 146 NLRB 611 (1964). See also *American Art Industries,* 166 NLRB 943, 952 (1967), enfd. 415 F.2d 1223 (5th Cir. 1969), cert. denied 397 U.S. 990 (1970) The General Counsel further argues that all supporting testimony should be stricken, citing *Packaging Techniques, Inc.*, 317 NLRB 1251, 1253 (1995).

pervisor Beckwith testified that he told Morehead the load had to be in Salisbury by 8 a.m., and had to be picked up by 2 a.m. Since Morehead's version of the assignment did not include any mandatory arrival time in Salisbury, he decided to spend Sunday night with his mother, and picked up the load at 8 a.m.

In response to the General Counsel's questions, Supervisor Sharon Johnson testified that driver Clarence Cheek told her on the morning of May 18 that there had been a "big thing" at Morehead's house.

Rodney Patterson testified that he called John Beckwith for his assignment at about 10 a.m. on the morning after the safety meeting, May 18. Instead of giving it to him, Beckwith put him on hold, and Sharon Johnson came onto the line. She asked Patterson, "How was the meeting?" Patterson stated that he thought Johnson meant the safety meeting, and replied that the food was all right, and that he appreciated the safety award. Johnson then stated that she heard Morehead had held a meeting. Patterson responded that he did not know what Johnson was talking about. She replied, "Well, I know you're smarter than that." Beckwith then got back on the line and gave Patterson his assignment.

Johnson testified further in response to Respondent's questions. Cheek had asked her whether she attended the "get-together" at Morehead's house, and she replied that she had not been invited to "the party." Morehead had parties to which Johnson had previously been invited, and she replied to Cheek that she did not go on this occasion. Johnson denied that either she or Cheek made any reference to a union meeting. Cheek, who was employed by Respondent at the time of the hearing according to Johnson, did not testify.

These conversations took place on the morning of May 18, as Morehead was proceeding toward Salisbury. He called the office at about 3 p.m., and told Beckwith that he had about an hour to go. Beckwith told him that he had to pick up a K-Mart load in Greensboro the next morning at 4 a.m. Morehead replied that he had to take his 8-hour break after delivering the load in Salisbury, and that there was no way he could get back to Greensboro by 4 a.m.[10] Beckwith replied, "Do the best you can." Morehead testified without contradiction that this was the first time he had heard of the K-Mart assignment. He delivered the Salisbury load,[11] "hooked" to an empty, and went to sleep in the back of the cab.

Morehead awoke at about 1 a.m., and started back for Greensboro. He called the office on the way, and asked Beckwith whether he should pick up the K-Mart load. Beckwith replied affirmatively. However, as Morehead approached the K-Mart gate, a communication device in the truck called a "Quailcom"[12] went off, and a message told Morehead to drop his empty at K-Mart, and then return to the office without picking up the K-Mart load.[13] Morehead verified this message by phone, and returned to the office. Apple, Johnson, and Beckwith were present. Apple said that he heard that Morehead had a meeting at his house. Morehead replied that he "had a few guys over." Apple responded that Morehead had no authority to call any meetings, that Apple ran the Company, that he called meetings when he got ready, and that Morehead was terminated. The latter then cleaned out his truck and returned with the keys. "Why are you really firing me?" he asked Apple. "You was late on some K-Mart delivery," Apple replied. Morehead denied this, and said that K-Mart did not have the loads ready and that he was going to the Board. Sharon Johnson replied that he had better be right, because the Company had the records for every time that he was late. Morehead's testimony concerning the exit interview is uncontradicted. Apple testified that there was no written reprimand in Morehead's personnel file, nor any complaint from a customer, despite the fact that Respondent did put such material in employee personnel files.[14]

VI. FACTUAL AND LEGAL CONCLUSIONS

The General Counsel has the burden of establishing a prima facie case that is sufficient to support an inference that protected conduct was a motivating factor in an employer's decision to discipline an employee. Once this is established, the burden shifts to the Respondent to demonstrate that the discipline would have been administered even in the absence of the protected conduct. The General Counsel must supply persuasive evidence that the employer acted because of antiunion animus.[15]

There is no doubt that drivers were dissatisfied with what they considered to be inadequate compensation for driving, for "dead-heading," for long hours and absence from home, and for waiting for orders at the distribution center. Apple's 1999 memo citing "turmoil" among the drivers corroborates this testimony. In that memo, Apple solicited expressions of driver concerns, and I credit the testimony of Reddick and Morehead that they voiced such complaints to Apple. These actions by Reddick and Morehead constituted protected, concerted activity. I make the same finding with respect to the meeting on May 8 of Morehead with other drivers and Union Agent Conrad at Morehead's house.

I credit Sharon Johnson's admission that Morehead wanted to talk about pay at the May 16 safety meeting, and asserted that the Company did not care about its drivers. I credit Morehead's testimony that other drivers voiced their complaints at the safety meeting. Morehead was corroborated by George Enoch, who had a truthful demeanor and no discernible bias. This testimony has more probative weight than Sharon Johnson's assertion that she could not remember whether other drivers voiced complaints, and I credit Morehead's and Enoch's testimony. I further conclude that the drivers' complaints made at the safety meeting constituted protected, concerted activity, and I make the same conclusion about the meeting of drivers in the restaurant parking lot after the safety meeting, and the subsequent second union meeting that evening at Morehead's house.

The crucial factual issue is whether Respondent knew or suspected that a union movement had begun and that Morehead was its leading proponent. I credit Morehead's uncontradicted testimony that he told employees in the restaurant parking lot after the safety meeting that there was going to be a

[10] As explained by Apple and other witnesses, drivers were required to stop driving for 8 consecutive hours after 10 hours of driving.

[11] The load was delivered in Salisbury at "17:45" (5:45 p.m.). The bill of lading was signed without any notation that it was late. GC Exh. 10.

[12] The "Quailcom" was described as a device in the truck which tracked the vehicle with the use of satellites, and gave its location.

[13] Apple agreed that the K-Mart load was probably not picked up until the following day, May 19.

[14] GC Exhs. 27 and 28.

[15] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (9th Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); and *Manno Electric,* 321 NLRB 278 fn. 12 (l996).

meeting at his house, and that a union agent would be present. Morehead further affirmed without contradiction that Clarence Cheek and another employee planned to attend the meeting and were following the other drivers, but "turned off" and did not attend.

The next morning, May 18, Clarence Cheek called Johnson and said that there had been a "big thing" at Morehead's house. Johnson denied that this event was referred to as a union meeting. At about 10 a.m. on the same morning, Rodney Patterson called Beckwith for his assignment that day. Instead of giving it to him, Beckwith turned the phone over to Johnson, who asked Patterson, "How was the meeting?" Patterson interpreted this question as a reference to the safety meeting, and replied accordingly. Johnson responded that she heard that Morehead had held a meeting. When Patterson replied that he did not know what Johnson was talking about, she stated: "Well, I know that you're smarter than that." The complaint alleges that Johnson's statements constituted unlawful interrogation.[16]

Patterson's call on the morning of May 18 was to Beckwith, for the purpose of obtaining his assignment. Respondent has supplied no reason for the fact that, before giving Patterson his assignment, Beckwith transferred the call to Johnson. Johnson began with the ambiguous question, "How was the meeting?" When Patterson interpreted this as an inquiry about the Safety Meeting, Johnson clarified her question. She heard that Morehead had held a meeting. This statement shows that Cheek's call to Johnson about the "big thing" at Morehead's was prior to Patterson's 10 a.m. call to Beckwith. Patterson's answer, that he did not know what Johnson was talking about, was clearly an evasion, and may reasonably be attributed to apprehension at the question. Johnson's response—"I know you're smarter than that"—shows her disbelief of Patterson's answer, and demonstrated to Patterson that Johnson knew about a meeting at Morehead's house, wanted to know whether Patterson had attended, and disapproved of Patterson's attempt to avoid a direct answer.

The Board has held that the test of the illegality of interrogation is whether, under all the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their rights. *Rossmore House*, 269 NLRB 1176 (1984). The Board stated that some of the factors to be considered are the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and cited *Bourne v. NLRB*, 322 F.2d 47 (2d Cir. 1964). In that case, the court listed the foregoing factors and added others, including whether a valid purpose for interrogation was communicated to the employee, and whether the employee was given assurances that no reprisals would be forthcoming.

Johnson was a supervisor who had previously discharged employees. Her inquiry was out of context with Patterson's attempt to get his assignment for the day. She gave no assurance to Patterson that attendance at Morehead's house would be free of reprisals. Although Johnson contended that she meant a "party," and that she had previously attended social gatherings at Morehead's, her "party" explanation is window dressing—she asked Patterson about the "meeting," not the "party." Although her interrogation began ambiguously, she made her meaning clear to Patterson. The Board has held that a similarly "cryptic" inquiry constituted unlawful interrogation. *Contemporary Guidance Services*, 291 NLRB 50, 66-67 (1988). I make the same finding here.

A definitive conclusion on whether Respondent had knowledge of, or suspected, that the meeting at Morehead's house concerned a union might be found in Cheek's version of his conversation with Johnson. However, Cheek did not testify. May an adverse inference be based on this fact? Wigmore states that "[t]he failure to bring before the tribunal some . . . witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the . . . witness, if brought, would have exposed facts unfavorable to the party."[17] Wigmore states four elements necessary to justify an adverse inference. These elements are: (1) It would have been "natural" for the party to produce the witness if the facts known by him had been favorable to the party who failed to produce him; (2) the inference is not proper if the witness is so prejudiced against the party that the latter could not expect to obtain unbiased testimony from him; (3) the inference is not allowable when the witness is equally available to both parties; and (4) the party himself fails to testify.[18] With respect to the third element, *Wigmore* states that there has been no disposition to enforce it strictly,[19] and cites the following language from the Fifth Circuit Court of Appeals:

> [T]he availability of a witness is not to be determined from his mere physical presence at trial or his accessibility for the service of a subpoena upon him. On the contrary, his availability may well depend, among other things, upon his relationship to one or the other of the parties, and the nature of the testimony that he might be expected to give in the light of his previous statements or declarations about the facts of the case.[20]

I conclude that Cheek was not "equally available" to the General Counsel. The Board and the courts have made adverse inferences upon a party's failure to call a witness.[21] I further conclude that Cheek's failure to testify justifies an adverse inference that, had he done so, his testimony would have been contrary to Johnson's testimony that the conversation she had with Cheek on the morning of May 18 did not include a reference to the meeting at Morehead's house as a union meeting.

On the afternoon of the same day, May 18, Morehead's assignment to go to the K-Mart distribution center and pick up a load was cancelled, and he was directed to return to Respondent's office. The first thing said to him by Apple was, "I heard you had a meeting." When Morehead replied that he had "a few guys over," Apple replied that Morehead had no authority to call meetings, that he, Apple, ran the Company and called meetings when he was ready, and that Morehead was terminated. The complaint alleges, inter alia, that Apple's statement that he heard Morehead had a meeting constituted unlawful interrogation.[22] Apple's further statements that he ran the

[16] GC Exh. 1(q), par. 8(a).

[17] *Wigmore on Evidence in Trials at Common Law*, Chadbourn revision, vol. 2, sec. 285, p. 192.

[18] Ibid secs. 286–289.

[19] Ibid sec. 288.

[20] *McClanahan v. U.S.*, 230 F.2d 919, 926 (5th Cir. 1956). Accord: similar cases cited by *Wigmore*, ibid.

[21] *American Chain Link Fence Co.*, 255 NLRB 692, 696, (1981), and cases cited there.

[22] GC Exh. 1(q), par. 8(a).

Company and called meetings were meaningless, since he could not possibly have meant that Morehead was attempting to assume control of the Company. Nor could Apple have been asking about something as innocuous as a social gathering. I conclude that he was asking whether Morehead held a meeting of employees involving the complaints of the latter and, possibly, a union. I find that this constituted unlawful interrogation violative of Section 8(a)(1).

It was not until Morehead gave his truck keys to Apple, after he had been terminated, that Apple came up with a different reason for the termination. Asked by Morehead why he was "really" fired, Apple replied that Morehead was late on "some" K-Mart delivery. The pretextual nature of this answer is apparent from the fact that it was the meeting at Morehead's house, not the alleged lateness of a delivery, which Apple gave simultaneously with his discharge of Morehead. Respondent's efforts to establish late deliveries as a reason for the discharge are in glaring contrast to the blunt facts of the discharge—Morehead was fired after he admitted he had a "few guys" over at his house.

The most unbelievable aspect of Respondent's efforts is its attempt to prove that it warned Morehead about lateness on May 10. Its witnesses affirmed this date in their pretrial affidavits. When Morehead's driver's log showed that this was impossible, all three of Respondent's witnesses stated that they had made identical mistakes in their affidavits. Beckwith admitted that he discovered the error in his affidavit on the day he testified, and that he discussed the error with Respondent's attorney subsequent to Apple's and Johnson's testimony on the preceding day. The evidence is sufficient to show that Respondent violated the sequestration rule, and that the probative weight of the testimony of Respondent's witnessed is diminished.[23]

I reject Apple's testimony that he warned Morehead about late deliveries on prior occasions—Apple could not supply any dates except the fabricated meeting on May 10, nor could he provide any written warnings or complaints from customers. Respondent's effort to prove Morehead's "late" deliveries from bills of lading was not persuasive, since the record, including Morehead's and Apple's testimony shows that it was impossible to determine how long a driver had to wait at the K-Mart distribution center before getting his load, and that any delay at the distribution center made all the deliveries to the stores late.[24]

Respondent introduced a document which Apple described as "a list of drivers that are no longer with West Motor Freight."[25] The list is printed and purports to show former drivers from February 4, 1997, through January 3, 2000. In the right hand column of the list are hand written notes purporting to show the reason for the employees' departures. Four of these, including Morehead, list lateness. Apple testified that he discharged all the employees so listed. Respondent offered no reason for the fact that part of the document is printed, while the part listing the reason for the discharges is handwritten. I consider this document to be of dubious value in the absence of any explanation for the handwritten portion. In any event, it has little probative weight without independent evidence that Morehead in fact had been late. The evidence does not warrant any such conclusion.

I do not credit Respondent's assertions that Morehead was told on May 17 to leave for Salisbury at 2 a.m. Once again, this was not given by Apple as the reason for Morehead's termination. Instead, I credit Morehead's testimony that he stated at the time of the assignment that he would leave at 2 a.m, but that no arrival time was specified by Respondent. He delivered the load in Salisbury without incident. George Enoch, who made deliveries to Salisbury twice weekly, testified that no delivery times were ever specified, and that receiving personnel were available at every hour. Morehead was not told at the time of the assignment that he would have to be back in Greensboro at 4 a.m. the day following the delivery in Salisbury. Beckwith informed him of this when Morehead called an hour away from Salisbury. When Morehead said that he could not make it back by 4 a.m. because the driving rules required him to take a rest period, Beckwith merely told him to do the best he could. In any event, all of Respondent's evidence on lateness is an elaborate afterthought.

Respondent also argues that Morehead was discharged because he was "disruptive" at the safety meeting, and "disturbing" to other drivers. This argument is based on Johnson's testimony. Its weakness is shown by the fact that it was not stated to Morehead by Apple at the time of the termination. Moreover Patterson testified that Morehead was merely "upset" at the safety meeting, although he "might have said a profane word." Enoch denied that Morehead was "disruptive" or that he interrupted anybody. This argument is also pretextual.

I conclude that Respondent knew or suspected that its employees were engaged in union activities, and that Morehead was a leading proponent of this movement. Thus, it knew by Apple's admission that its employees were dissatisfied and in "turmoil" over their concerns. On the basis of Johnson's testimony about the telephone call from Clarence Cheek, it knew that there had been a meeting at Morehead's house on the evening of Respondent's safety meeting. Johnson's interruption of Patterson's call to Beckwith for his assignment, and her interrogation of Patterson, show that she suspected that the meeting was one that involved more than social activities. It is improbable that she would have interrupted Patterson's business call to Beckwith to inquire about a party, which, she contended, was the reason for her inquiry. It is similarly improbable that Apple would have discharged Morehead because he had a social event at his house. Johnson's interrogation of Patterson about the meeting, and Apple's question to Morehead about the same subject demonstrate Respondent's suspicion that it was a union meeting, and also establish Respondent's animus against such activity. The Company's submission of pretextual reasons for Morehead's discharge supports an inference that its real reason was something different. The Board has held that "it is well settled that knowledge of the employee's protected activity need not be established directly, but may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn." *Hospital San Pablo, Inc.,* 327 NLRB 300 (1998). The Board elucidated some of the circumstantial evidence in a later case. "We may infer knowledge based on such circumstantial evidence as the timing of the alleged discriminatory actions; the Respondent's general knowledge of its employees' union activities, and the pretextual reasons given for the ad-

[23] See fn. 7, supra.

[24] I agree with the General Counsel that Respondent did not comply with the General Counsel's subpoenas in that it supplied cover bills rather than the complete bills of lading. Supra, fn. 9. I find it unnecessary to strike Respondent's evidence on this issue as the record shows that it is not reliable.

[25] R. Exh. 9.

verse personnel actions." *North Atlantic Medical Services,* 329 NLRB 85 (1999). In a case where the employer discharged employees 9 days after the advent of the union movement, the Court of Appeals for the Second Circuit deemed "the stunningly obvious timing of the layoffs," together with the other evidence, to be sufficient to warrant an inference of discriminatory motivation. *NLRB v. Novelty Products Co*., 424 F.2d 748, 750 (2d Cir. 1970). In the case at bar, the alleged discriminatee was discharged split seconds after he told the employer that he had "a few guys" over at his house. I conclude that Respondent discharged him on May 18, 1999, because he assisted the Union and engaged in concerted activities, and in order to discourage employees from engaging in concerted activities, thus violating Section 8(a)(3) and (1) of the Act.

In accordance with my conclusions above, I make the following.

CONCLUSIONS OF LAW

1. Respondent, West Motor Freight of Pennsylvania, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Pipeliners Local Union No. 798 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a) (1) of the Act by coercively interrogating its employees concerning their union activities.

4. Respondent violated Section 8(a)(3) and (1) of the Act by discharging Daniel Morehead on May 18, 1999, because he assisted the Union and engaged in protected, concerted activities.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent unlawfully discharged Daniel Morehead on May 18, 1999, I shall recommend that Respondent be required to offer him immediate reinstatement to his former position, dismissing if necessary any employee hired to fill his position, or, if such position does not exist, to a substantially equivalent position, and to make him whole for any loss of earnings he may have suffered by reason of Respondent's unlawful conduct by paying him a sum of money equal to the amount he would have earned from the time of his discharge to the date of an offer of reinstatement, less net earnings during such period, to be computed in the manner established by the Board in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)[26] I shall recommend that Respondent be required to remove from its records all references to its unlawful discharge of Morehead, and inform him in writing that this has been done, and that these actions will not form the basis of any future discipline of him.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

The Respondent, West Motor Freight of Pennsylvania, Greensboro, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities or sympathies.

(b) Discharging or otherwise disciplining employees because of their union activities or sympathies.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 8(a) (1) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Daniel Morehead reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Daniel Morehead, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Make Daniel Morehead whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(e) Within 14 days after service by the Region, post at its facility in Greensboro, North Carolina, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 11,after being signed by Respondent's representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 18, 1999.

[26] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 281 NLRB 651 (1977).

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate our employees about their union activities or sympathies.

WE WILL NOT discharge employees or otherwise discriminate against them because of their union activities or sympathies.

WE WILL NOT in any like or similar manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL, within 14 days from the Board's Order, offer Daniel Morehead full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges.

WE WILL make whole Daniel Morehead for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Daniel Morehead, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WEST MOTOR FREIGHT OF PENNSYLVANIA